

CURRENT LEGAL DEVELOPMENTS

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Trends

The Decision to Block Iranian Assets—Reexamined‡

The full story behind the decision to impose a freeze on Iranian assets may never be known. But a report issued in July 1981 by the staff of the House Committee on Banking, Finance and Urban Affairs provides a great deal more information about it than was previously available to the public. In so doing, it helps set to rest some of the more fanciful of the accounts that appeared in the press, as well as to provide as reasoned a basis for appraising the decision as is likely to emerge. For these reasons, and because the Iranian revolution and the freeze engendered such an unprecedented spate of litigation, this installment of *Trends* reexamines the decision to freeze Iranian assets in light of the findings of the staff report.

Background

The President imposed the freeze on Iranian assets on November 14, 1979. Ten days earlier, the United States Embassy in Tehran and the United States Consulates in Tabriz and Shiraz had been seized by a group of Iranian students who took hostage all persons present, diplomatic and non-diplomatic.

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It was not the first time the Embassy had been attacked. On February 14, three days after the resignation of the Shah's caretaker government headed by Shahpur Bakhtiar, a mob led by Marxist guerillas had overrun the Embassy, taking nearly a hundred Americans hostage in an episode similar to that which was to take place nine months later. The February siege had ended when the Iranian Deputy Prime Minister personally led a group of revolutionary guards to obtain the release of the captured embassy personnel.¹ Later, only the week before the November 4 takeover, the provisional government of Prime Minister Mehdi Bazargan had turned marching demonstrators away from the streets outside the American Embassy.² Apparently, the success of the government authorities in thwarting these assaults gave the United States government cause to hope that the November 4 seizure, too, would be shortlived. In fact, for a brief time it appeared the Iranian government would again assert its authority and rescue the embassy and the hostages.³

For at least two reasons the Iranian government could not do so, however. The first is that the students who had seized the embassy, planning to stage a sit-in for three to five days, instantly became folk heroes in Iran and thereby a political force more powerful than the government could control. Indeed, the Ayatollah Khomeini himself endorsed the taking of the embassy and the hostages. The second reason is that on November 6, in a not unrelated development, Prime Minister Bazargan's provisional government resigned, yielding such power as it still retained to the dominant Islamic clergymen of the secret Revolutionary Council, a group for whom a resolution of the hostage crisis was not to become a matter of urgency for many months. In the meanwhile, the students, who became known as Students Following the Imam's Line, managed to precipitate a major international crisis that was as much public theater as it was an intergovernmental dispute.

The crisis was felt first in Washington. There, the inability of the United States government to obtain the release of its diplomats and other United States nationals seemed to symbolize a national impotence which had begun with a failure of will in Vietnam. The American people are not noted for their patience in the face of what they perceive to be a deliberate provocation, a challenge to American national manhood. Correctly or not,

¹See REPORT STAFF OF HOUSE COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS, 97TH CONG., 1ST SESS., IRAN: THE FINANCIAL ASPECTS OF THE HOSTAGE SETTLEMENT AGREEMENT 3 (Comm. Print 97-5, July 1981) [hereinafter cited as HOUSE STAFF REPORT]. This document was prepared in response to a request by Committee Chairman Fernard J. St. Germain (D.-R.I.) for a detailed analysis of the financial aspects of the Iranian hostage settlement agreement.

²See Kifner, *How a Sit-In Turned into a Siege*, in *America in Captivity: Points of Decision in the Hostage Crisis*, *An Inquiry by The New York Times*, New York Times Magazine (Special Issue, 1981), at 54, 56.

³The Iranian Foreign Minister had indicated that such a move was underway, in a conversation with the American *charge d'affaires* shortly after the November 4 takeover. HOUSE STAFF REPORT at 9.

such challenges were considered by many Americans to have become more frequent in the 1970s and American responses to them were thought to have become intolerably passive during the presidency of Jimmy Carter. Carter had remained an enigma to the public: cool, aloof, thoughtful but indecisive, a decent man whose decency did not often seem to result in tangible achievements in international relations. More importantly, perhaps, he had never managed to secure the political blessings that come from a supportive press and a party majority in Congress. In his years as President, Carter faced a capital press corps and a Congress united in their separate determination to reassert their respective prerogatives.

The seizure of the American Embassy in Tehran, and even more the taking and televised display of the American hostages, presented President Carter with a dramatic opportunity to show the American public just how decisive and forceful a chief executive he could be. The *Mayaguez* incident had provided President Ford with a similar opportunity, in May 1975, just two weeks after the final, ignominious departure of the United States military forces from Vietnam. President Ford's waning popularity had increased dramatically with the release of the vessel and its crew, even though the raids he ordered seem to have had little to do with their release and, in fact, appear to have been expensive in operation, with 41 Americans lost and 50 more wounded. In a culture which counts the quick-acting sheriff as a superhero and instinctively distrusts anyone who counsels caution, the hostage crisis presented a ready-made opportunity for an American president to give his political popularity a boost. The temptation to do something quickly, dramatically, decisively, must have been seductive.

President Carter moved cautiously, however, appealing to Americans to exercise restraint toward Iran and toward Iranian citizens in the United States and to do nothing that might endanger the lives of the hostages.⁴ A decision was reached to make every effort to gain the release of the hostages through diplomatic means to avoid putting the hostages' lives in danger.⁵ The President decided, first, to send two special envoys to Iran to meet personally with the Ayatollah Khomeini to secure his help in obtaining the release of the hostages. One of the envoys, former Attorney General Ramsey Clark, had had a long and close association with many of the new Iranian leaders and had met with the Ayatollah in Paris earlier in the year. The other, William Miller, Staff Director of the Senate Committee on Intelligence, had served in Iran as a Foreign Service Officer in the 1950s and 1960s and he, too, knew the Iranian revolutionary leaders. The Iranian government initially indicated that it would receive the Clark-Miller mission, but as Mr. Clark was about to board a commercial flight from Istanbul to Tehran on November 7, he was informed that the Iranian government

⁴*Id.* at 9-10.

⁵*Id.* at 10. See also Smith, *Putting the Hostages' Lives First*, in *America in Captivity: Points of Decision in the Hostage Crisis, An Inquiry by the New York Times*, New York Times Magazine (Special Issue, 1981), at 77 ff. (hereinafter cited as *Hostages First*).

had decided that he should not come to Iran and that no officials in Iran should have discussions with American representatives.⁶

Other than to continue to pursue diplomatic efforts, President Carter had few realistic options available to him that were likely to secure the release of the hostages while at the same time protecting long-term United States interests in the Persian Gulf. Military options were considered feasible, but were rejected nonetheless as unlikely to free the hostages.⁷ Economic sanctions which, by statute, necessitated a declaration of war against Iran were rejected on that account alone.⁸

The first public announcement by the Carter Administration of action linked to the American hostages came on November 10, six days after they had been taken captive. The President ordered Attorney General Benjamin Civiletti to identify any Iranian students in the United States who were not complying with the terms of their reentry visas and to initiate deportation proceedings against any Iranian students who had violated immigration laws and regulations. In the weeks to follow, this action was to prove not only unpopular but ineffective as well, the latter in part because of some

⁶Contacts and talks undertaken by the Clark-Miller mission in Turkey, in combination with others in Washington and elsewhere, led to the release of thirteen hostages on November 19 and 20.

⁷Terrence Smith, who was the *New York Times*' chief White House correspondent during the hostage crisis, reports that when the President met with his advisers at Camp David on November 20, sixteen days after the seizure of the hostages, the military options presented by the Pentagon included a naval blockade of Iran, mining of Iranian harbors, seizure of the oil depots on Kharg Island and a punitive bombing of the huge refinery at Abadan. All were deemed militarily feasible, but none was thought likely to lead to the safe release of the hostages. *Hostages First*, *supra* note 5, at 83. The *House Staff Report* observed that "during the immediate post-hostage period, military options with economic significance such as blockade of Iranian ports were under consideration. Nonmilitary political and economic alternatives, which were always considered the preferable course, were the subject of detailed option papers during the November 10 to November 14 period." HOUSE STAFF REPORT at 10.

⁸*Id.* One possibility seriously considered in the early days of the hostage crisis was a complete export embargo. The Export Administration Act, 50 U.S.C. App. §§ 2401 *et seq.* (1969), as amended, does not authorize a total embargo. The Trading with the Enemy Act, 50 U.S.C. App. §§ 1 *et seq.* (1970) does, but the imposition of economic sanctions under the Trading with the Enemy Act would have required a declaration of war against Iran and was, apparently for this reason, not seriously debated or considered. See HOUSE STAFF REPORT at 10. A complete embargo was also deemed permissible under the International Emergency Economic Powers Act, which does not require a declaration of war. But complete or even partial export embargos inevitably implicate third countries. The *House Staff Report* concluded:

Export embargo options also required that before deciding on the scope of any foreign policy controls, it was necessary to consider the extent to which United States goods and technology used by foreign companies and United States foreign subsidiaries should be subject to controls. This was an important point bearing on United States relations with third countries. It was also necessary to consider whether the controls would apply to all items produced by foreign subsidiaries of United States firms even if those items did not contain United States origin goods or technology. Any form of export control or embargo had a myriad of commercial and economic ramifications which were often broader than the purpose of the controls. Any controls imposed would have to allow sufficient flexibility to permit the Commerce Department to alleviate any unintended commercial or economic consequences without appearing to lessen United States resolve.

HOUSE STAFF REPORT at 11-12.

doubts about the constitutionality of a classification of aliens motivated solely by a foreign policy dispute with the government of the aliens' homeland.⁹

The Administration's first direct economic sanction against Iran came two days later, on November 12, in the form of an immediate discontinuance of United States oil imports from Iran. In a sense, this was the first "freeze," but unlike the monetary freeze which followed two days later, the principal objective of cutting off oil imports from Iran was essentially defensive—that is, to deprive Iran itself of the capacity to threaten a cut-off of its oil to the United States.¹⁰

The possibility of imposing a freeze on Iranian assets had been considered as early as February 1979, some nine months before the seizure of the embassy and the taking of hostages.¹¹ The political situation in Iran had been in turmoil since late in December 1978.¹² The daily strikes and demonstrations against the Shah had spread to the oil fields and had begun to threaten to interrupt the flow of oil exports badly needed in the United States, Western Europe and Japan. The position of the Shah himself deteriorated quickly, culminating in his departure from Iran on January 16 "for an extended vacation" from which he never returned. Wildly cheering crowds, upward of a million people, had taken to the streets to greet the Ayatollah Khomeini upon his return to Iran on February 1st after fifteen years of exile. Ten days later the Bakhtiar regime had resigned and three days after that had come the abortive seizure of the American Embassy.¹³

At the State Department an inter-agency task force had been established in December to prepare specific plans to draw down the official presence of United States nationals in Iran—no easy task considering the number of Americans then in Iran (as many as 40,000 to 50,000, about 1,500 of whom were there in an official capacity), the \$12 billion in United States military sales contracts with the Iranian government, and the existence in Iran of two sensitive intelligence monitoring stations.¹⁴ At the National Security Council, a Special Coordinating Committee chaired by Zbigniew Brzezinski, the President's National Security Adviser, was meeting on a daily basis to review the evacuation plans and discuss developments in Iran.¹⁵

The economic situation in Iran was also chaotic, again because of the disruptions in work and the virtual collapse of civil authority, but also

⁹See *Narenji v. Civiletti*, 481 F. Supp. 1132 (D.D.C.), *rev'd*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). See also Note, *Aliens—Constitutionality of Discrimination Based on National Origin*—*Narenji v. Civiletti*, 21 HARV. INT'L L.J. 467 (1980).

¹⁰See HOUSE STAFF REPORT at 10.

¹¹*Id.* at 5.

¹²*Id.* at 1. A series of increasingly violent incidents and demonstrations that occurred in Tehran and other major Iranian cities, including some incidents both in the vicinity of the United States embassy and involving United States commercial offices, led to the establishment of the State Department working group. *Id.*

¹³*Id.* at 2.

¹⁴*Id.*

¹⁵*Id.*

because the Ayatollah Khomeini periodically threatened to repudiate contracts with American firms negotiated by the Shah.¹⁶ The threats were general, not specific, but given the Ayatollah's exalted stature in revolutionary Iran, they were bound to be disruptive.

The operations of Iran's central bank, Bank Markazi, had been interrupted by the strikes, the unfamiliarity of new bank and other government officials with standard banking and commercial procedures, and the ongoing uncertainty over who was authorized by whom to approve what. But in an effort to maintain Iran's credit rating, Bank Markazi was apparently meticulous in servicing foreign loans on schedule and in keeping its creditors informed when for any reason payments were as late as two or three days.¹⁷

Nevertheless, the possibility of a repudiation by Iran of American contracts, including bank loan agreements, and a withdrawal of Iranian funds from American banks was taken seriously enough in both the State and Treasury Departments to warrant more than routine consideration of imposing a freeze on Iranian assets.¹⁸ A February 12, 1979, legal memorandum requested by the Treasury's Office of General Counsel noted that a freeze could be imposed under the International Emergency Economic Powers Act (IEEPA),¹⁹ if the President declared a national emergency—a move, the memorandum said, that was no more extraordinary than what would have been needed to trigger a freeze under the Trading with the Enemy Act before that Act was revised.²⁰ From a legal standpoint, it added, quite apart from political considerations, the situation then prevailing in Iran justified the use of IEEPA. Not only had Congress intended IEEPA to cover this type of situation, the memorandum said, but case law, too, would support the President's decision to declare a national emergency as a political judgment which courts traditionally are reluctant to question.²¹ Meanwhile, its author wrote, Treasury Department lawyers would continue to look into whether banks and other claimants had private, self-help remedies available to them.²² Attached to the memorandum were pro-

¹⁶These threatened contracts eventually led to attempts by unpaid suppliers to obtain prejudgment attachments on Iranian assets within the United States.

¹⁷HOUSE STAFF REPORT at 3. In March and April 1979 Iran publicly reassured foreign leaders that it intended to continue paying its debts. American banks polled by Chase Manhattan Bank (acting as agent for three syndicated loans to Iran) refused to consider calling any of the Iranian loans under provisions in the loan agreements that were to become controversial when a Chase-led syndicate declared one of the loans in default following the President's imposition of the freeze. *Id.*

¹⁸HOUSE STAFF REPORT at 4-5.

¹⁹50 U.S.C. §§ 1701 *et seq.*

²⁰The provisions and operating history of these statutes are discussed in Gordon, *The Blocking of Iranian Assets*, 15 INT'L LAW. 296 (1980).

²¹HOUSE STAFF REPORT at 5.

²²HOUSE STAFF REPORT at 5. Another staff legal memorandum, also requested by the Treasury's Office of General Counsel and dated February 14, two days after the one herein referred to, contained a detailed discussion of the remedies available to private United States

posed regulations to implement a freeze if one were ordered.²³

At about the same time, the Treasury Department's International Affairs Office began to gather current information on Iranian assets and liabilities within the United States and U.S. portfolio capital movements involving Iran.²⁴ Reports from the Federal Reserve Bank of New York (the New York Fed) to the Treasury Department showed that Iran had made substantial shifts of funds on February 2 and 8.²⁵ Though large enough to warrant concern, these movements were apparently requested by Iran for routine payment and liquidity purposes and were not meant as a signal of economic warfare against the United States.²⁶ Indeed, the fact that Iran continued to channel its petrodollars through, and maintain accounts in, American banks may be seen, in retrospect at least, to be an indication that practical considerations dictated Iran's continuing dependence on the facilities provided by American commercial banks.²⁷

Be that as it may, high officials in the International Affairs Office, apparently in response to a request from the interagency task force, also considered the economic ramifications of a withdrawal of Iranian funds from United States banks or the conversion of Iranian-held dollars into other currencies.²⁸ The conclusions reached by Treasury Department officials by mid-February 1979 were that American banks (including their foreign branches) collectively probably held Iranian deposits in excess of their credit exposure to Iran; the United States government also held Iranian funds in amounts which substantially exceeded current government claims

claimants in the absence of a governmental freeze on Iranian assets within the United States. *Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.* The Federal Reserve Bank of New York (the "New York Fed," as it is known in banking circles) acts as an agent of the Treasury in gold and foreign exchange transactions and is an agent of the Federal Reserve banks for foreign accounts. *See* THE FEDERAL RESERVE SYSTEM 276 (Board of Governors of the Federal Reserve System, 5th ed., 1963). The agency relationship between the New York Fed and the Treasury is authorized by statute, 12 U.S.C. § 391 (1968) and implemented by Treasury regulation and contract. *See*, for example, the Iranian Assets Control Regulations, 31 C.F.R. 535.213 (1981), issued pursuant to Exec. Order No. 12,170 and 12,205 under the authority of 50 U.S.C. § 1702 (1977), that is, IEEPA.

²⁶HOUSE STAFF REPORT at 5. The movement of Iranian funds among American banks may be coincidental to, but then again may be explained by, Iran's deliberate shift of the funds of the National Iranian Oil Company [NIOC] from Chase Manhattan Bank to other American banks. The NIOC account, representing oil payment dollars, was held at Chase Manhattan Bank while the Shah ruled Iran. In post-Shah Iran, however, NIOC's Chase account was wound down, deliberately, in retaliation for the close association the Bank and its chairman, David Rockefeller, had had with the Shah. Apparently, most of these funds (the weekly flow of NIOC dollars through Chase had been as much as \$300-\$500 million during 1979) were transferred to foreign branches of other U.S. banks, especially Bank of America, which had aggressively courted the NIOC funds. *See* HOUSE STAFF REPORT at 8, 38 and 51-56.

²⁷*Id.* at 8.

²⁸*Id.* at 5. A legal memorandum prepared by the International Affairs Office concluded that two alternatives would be available if this happened: *i.e.*, a freeze of Iranian assets which also blocked transactions involving such assets, and suits by the United States government and private parties in American courts within the limitations of the Foreign Sovereign Immunities Act of 1976. *Id.* at 6.

on Iran; all Iranian assets in the United States could be frozen and all financial transactions blocked on the basis of a presidential declaration under IEEPA²⁹ of a national emergency related to Iran; and assets of private Iranian residents in the United States might be subject to attachment, but those of Iranian government agencies probably could not be reached by attachment.³⁰ Thus, some nine months before the November hostage crisis, the Treasury Department as a matter of prudent contingency planning had laid the basis for a freeze of Iranian assets very much like that which the President eventually imposed.³¹

That its contingency plans contemplated the imposition of a freeze and regarded as manageable the difficulties likely to be encountered in putting one into effect does not compel the conclusion that the Treasury intended all along to freeze Iranian assets and that it merely used subsequent events to justify such a plan. One does not know how many other contingencies were anticipated with plans that were never used. And one does not know how seriously the possibility of invoking a freeze was taken at high-ranking policy levels within the Carter Administration or to what extent actual events reflected the contingencies anticipated. The drafting of foreign assets control regulations, though complex and technically demanding when done without the guidance of precedent, is one of those exercises in economic control in which the Treasury Department has had extensive experience. Since the end of World War II, the United States has frozen the assets within or coming within its jurisdiction of the People's Republic of China,³² North Korea,³³ Cambodia,³⁴ Vietnam,³⁵ and Cuba³⁶—all pursuant to regulations prepared by the Treasury's Office of Foreign Assets Control. The statutory basis of such regulations had changed, substantially so, with the passage of IEEPA and amendments to the Trading with the Enemy Act.³⁷ But these changes did not render obsolete existing or previously administered regulations or the expertise gained in administering them. Thus, the drafting of Iranian assets control regulations does not necessarily indicate that a high priority was being given at that time to the possibility of blocking those assets.

²⁹See note 25, *supra*.

³⁰HOUSE STAFF REPORT at 6.

³¹*Id.* At the State Department, the interagency task force was also considering the possibility of some form of economic sanctions against Iran, but in more general terms than was the case at the Treasury. The Treasury Department was the lead agency in financial aspects of a freeze. *Id.* at 7.

³²China was removed from most foreign assets control regulations in 1980. See 15 Fed. Reg. 9,040 (1950), as amended at 18 Fed. Reg. 2,079 (1953) and at 45 Fed. Reg. 7,224 (1980).

³³North Korea, *i.e.*, Korea north of the thirty-eighth parallel of north latitude, has been subjected to an assets freeze since December 17, 1950. See 31 C.F.R. § 500.201.

³⁴Cambodia has been subjected to an assets freeze since April 17, 1975. *Id.*

³⁵North Vietnam has been subjected to an assets freeze since May 5, 1964, and South Vietnam since April 30, 1975. *Id.*

³⁶Cuba has been subjected to an assets freeze since July 8, 1963. See 32 C.F.R. § 515.201.

³⁷See Gordon, *supra* note 20, *passim*.

It is by no means certain that high-ranking Treasury Department officials even favored a policy of freezing Iranian assets in the event Iran repudiated contracts with American firms and converted dollars into other currencies. In fact, the public record does not reveal that the contingency plans being developed within the General Counsel's Office were requested by, or even sent to, the Secretary of the Treasury or the Assistant Secretary for International Affairs—the two individuals who more than any others would have been responsible for making a decision to recommend the imposition of a freeze to the President. It is known that an internal Treasury memorandum (author(s) unidentified) in January 1979 concluded that

There are two reasons why U.S. banks would not be particularly vulnerable to a sudden withdrawal of Iranian deposits. First, Iranian deposits with U.S. banks have varying maturities which stretch out over months if not years. Second, banks have immediate access to several alternative sources of funds which have evolved to support an essential function of banking—maturity transformation.³⁸

This accords with the Treasury's longstanding public posture that American banks could cope with even massive foreign withdrawals of deposits. In testimony in April 1977 before a subcommittee of the House Banking Committee, C. Fred Bergsten, Assistant Secretary of the Treasury for International Affairs, had said of the possibility of withdrawal of substantial amounts of petrodollar deposits in United States banks by members of the Organization of Petroleum Exporting Countries (OPEC):

Well, if they took them out of American banks, where would they put them? Only in the Eurocurrency [market]. Then, because of the way interest rates would react to that and because of the workings of the interbank markets, the money would be funneled back largely to the banks from which they came in the first place. That is not just theory; that is fact.³⁹

Financial Consideration

To appreciate the context in which these remarks and similar ones emanating from Treasury Department and other United States monetary authorities in the late 1970s were made is to recall the dramatic changes overtaking commercial banking at the time. These changes affected both the profitability of banking operations and the difficulty of managing the funds banks handle. Commercial banks traditionally earn profits by buying deposits for less than they charge for the use of the funds. However, in the 1970s both the ways in which commercial banks raised funds and the ways in which they placed funds had changed. On the deposit side, in the 1950s and 1960s, United States commercial banks had been able to tap comparatively stable sources of funding, a large proportion of which took the form of interest-free checking accounts ("demand deposits") in amounts that remained relatively constant or that varied in predictable patterns. By

³⁸Quoted in HOUSE STAFF REPORT at 3.

³⁹*Id.*

the late 1970s, this proportion had declined sharply as a result of keen competition for savings, especially in this regard short-term savings of the type characterized by demand deposits. The federal government was a source of competition, as the Treasury borrowed record amounts of short-term funds to bridge the time gap between federal tax receipts and expenditures. The corporate sphere was another, as the issuance of short-term commercial paper became an increasingly popular medium of corporate financing, especially with the advent of money market mutual funds. And the banking industry itself became more competitive, as savings and commercial banks became more innovative in an effort to attract deposits. Thus, whereas in 1952 demand deposits had accounted for more than 70 percent of commercial bank liabilities (they are liabilities because they represent claims on bank assets by depositors), by 1977 they accounted for less than 30 percent.⁴⁰ This meant a higher overall cost of funds to the banks, a factor which was magnified as large commercial banks began to rely more heavily on relatively high-cost overnight borrowing (typically by selling their holdings of United States government securities under arrangements to repurchase them a day or a few days later at a slightly higher price—the difference between the sale and purchase prices, in effect, constituting the interest on what is essentially a very short-term loan).

Bank lending patterns had changed, too, partly because commercial borrowers had become more aggressive in seeking capital, partly because capital was available, on attractive terms, from buyers of corporate commercial paper⁴¹—especially (by late in the decade) the money market funds⁴²—and from foreign banks.⁴³ In short, liquidity led increasingly to a “buyers,” i.e., borrowers’, market. This pattern was reflected in a sharp increase in the average length of maturity of bank loans. In the 1960s, bank loans to businesses carrying maturities of more than a year were rare. By the late 1970s, loans of up to ten years had become commonplace.⁴⁴ A similar trend was evident in personal loans.⁴⁵

Thus, in addition to being caught in a squeeze on their profits from United States banking operations, the banks found themselves confronting anew a classic problem of banking: that is, “liability management” or “maturity transformation,” as it is variably described, or what to do when you are borrowing short-term (and from unstable sources, at that) and lending long. If, for any reason, the banks were unable to continue to attract

⁴⁰ See Bennett, *For the Banks, It's Change or Perish*, N.Y. Times, Aug. 9, 1981, Sec. 3, at 24.

⁴¹ The commercial paper market doubled between 1977 and 1980, growing to more than \$140 billion. *Id.*

⁴² The net assets of money market funds held fairly constant from 1975 to 1978, burgeoned from less than \$10 billion in 1978 to around \$70 billion by 1980, then reached a total of about \$140 billion by mid-1981. *Id.*

⁴³ Foreign banks accounted for less than 1% of the loans extended to the nonfinancial sector in 1967. By 1980 that proportion had grown to 14%. *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

short-term funds or were met with a rapid withdrawal of large amounts of such funds, and at the same time were unable to sell off their long-term loans and other investments without taking huge losses, their liquidity would be threatened and the possibility of bankruptcies would arise. Even the prospect or rumor of a liquidity crunch at a major bank could be enough to cause panic among its depositors and send shock waves throughout capital markets generally. If the entire banking system were seen to be similarly distressed, a self-reinforcing run on the dollar and sell-off of dollar-denominated securities could be expected to follow.

In contrast to their domestic operations, the overseas activities of United States commercial banks flourished both in volume and profitability in the 1970s, but again with serious implications for the management by such multinational banks of their liabilities. United States banks had been attracted overseas in the middle 1960s by the Eurodollar market. A word or two needs to be said at this point about the misleading word "Eurodollar" and what it describes. The most uncluttered (and until December 3, 1981, accurate) explanation of the term remains that which Henry Harfield, of the New York law firm of Shearman & Sterling, provided in an article in the *Banking Law Journal* in 1972:

A "Eurodollar" is a claim expressed and payable in United States dollars, that is properly made against any bank at one or more of its offices or establishments outside the United States. The "Euro" part of the word is merely a misleading convenience. A Eurodollar is a claim, such as I have defined, that may be payable anywhere in the world outside of the United States. In a particular instance, it might be an Afro-dollar or an Asia-dollar, or a Latino-dollar, or even a Canuck buck; we sweep them all into the categorical term "Eurodollar."⁴⁶

Beginning in 1973, the Eurodollar market took on a new function: that of recycling the unprecedented amounts of surplus (that is, investable) dollars, accumulated by OPEC nations from the sale of exported oil at sharply increased prices, which cannot immediately be spent on goods and services.⁴⁷ The competition among Eurodollar banks for a share of the OPEC surplus recycling business was fierce. The largest American commercial banks were able to receive a preponderant proportion of these funds both because of their competitive zeal and, presumably, because investors whose

⁴⁶Harfield, *International Money Management: The Eurodollar*, 89 BANKING L.J. 579 (1972). This definition was amended de facto on December 3, 1981, when United States banks opened the newly permitted "International Banking Facilities" to handle Euromarket business onshore. The salient characteristic of "IBFs," however, is that because United States interest limitations and reserve requirements do not apply to deposits booked in the IBFs, the deposits may be held only by offshore persons or entities and the funds so raised may be relent only for use abroad. The hope of the regulators in imposing these limitations on IBFs is that IBF transactions will not affect the domestic economy's money supply. As a result of this new form of participation in the Eurocurrency markets by United States banks, an updated definition of "Eurodollar" might be considered to be one of a dollar that circulates offshore, i.e., outside the domestic economy of the issuer of the currency. The focus is no longer on *where* the dollar deposit is "payable."

⁴⁷See B.J. COHEN, *BANKS AND THE BALANCE OF PAYMENTS* 4-5 (1981).

preference was to hold dollar assets preferred to take the liabilities of the largest banks whose "natural" currency is the dollar. By September 1977, over \$19 billion had been invested by OPEC countries in foreign branches of American banks and \$9 billion more in head offices of American banks.⁴⁸

For American commercial banks large enough to attract these petrodollars to their foreign branches,⁴⁹ such placement had an added dimension as noteworthy as the funds themselves. That is, funds on deposit with the foreign offices of United States banks were generally less subject to regulation than funds held on deposit with the banks' head offices or branches in the United States.⁵⁰ To depositors, this was reflected in higher interest rates than the bank could pay on a similar account held at its head office or branches in the United States.⁵¹ For the banks, aside from the added competitiveness that resulted from being free to bargain for available funds, this flexibility most usefully took the form of release from Federal Reserve Board requirements, specifically the need to maintain reserves against balances booked abroad, even if these deposits were, in effect, redeposited by a United States bank's foreign branch in its head office in the United States.⁵²

American commercial banks, among others, recycled some of these petrodollar deposits into large-scale, long-term "sovereign loans," often to developing countries, the Shah's government being a favored borrower. These Eurodollar sovereign loans are variable interest rate loans provided at some margin over the London Interbank Offer Rate (LIBOR), to which commitment fees (and, where loans are syndicated, as they usually are, management and participation fees) are added.⁵³ These rates and fees are primarily a function of the Eurodollar loan market, but also reflect banks'

⁴⁸Basagni, *Recent Developments in International Lending Patterns*, in Cohen, *supra* note 47, at Table 3.1, page 79. See also letter dated January 10, 1978 from Secretary of the Treasury W. Michael Blumenthal to Rep. Henry S. Reuss, Chairman of the House Committee on Banking, Finance and Urban Affairs, 124 CONG. REC. H1403-H1408 at H1407, Feb. 23, 1978 (hereinafter cited as "Blumenthal letter"). The actual amount of OPEC investment in the United States at this time may have been higher, since available figures do not reflect indirect investments made through nominee accounts. *Id.*

⁴⁹The exact terms under which these OPEC investments are deposited in banks outside the United States are not generally disclosed by the banks, for competitive reasons. Aspects of these terms became the subject of litigation in Europe when Iran sought to obtain the release of its deposits in European branches of United States banks, following the imposition of the freeze.

⁵⁰See Harfield, *supra* note 46, at 582-585 and 589-590. But see note 52, *infra*.

⁵¹Indeed, the attractiveness of Euro-interest rates, not just the OPEC surplus and world liquidity demands by themselves, explains the extraordinary volume of Eurocurrency financing by the late 1970s. See Cohen, *supra* note 47, at 69-70.

⁵²Harfield, *supra* note 46, at 589-590. However, deposits are subject to reserve requirements if the bank has guaranteed payment by the foreign branch and, at present, on "Eurocurrency liabilities" as defined in Regulation D (funds raised abroad and returned to the United States or lent to United States residents). *Id.* at 589-590n, and Lichtenstein, *United States Legislation and Regulations Applicable to Deposits and Loans Held by United States Branches or Subsidiaries Outside the United States*, in LES EUROcredits (Blaise, Fouchard & Kahn eds.) at 409-419 (Librairies Techniques, Paris, 1981).

⁵³See the Blumenthal letter, *supra* note 48, at H1407.

assessment of the creditworthiness of individual borrowers.⁵⁴ The least creditworthy pay the highest rate and, so long as these loans are serviced in a timely manner, they should be the most profitable to the banks.

By the end of 1977, American banks' exposure to default from loans to foreign governments had become a matter of congressional concern,⁵⁵ as had the capacity of the banks to manage their liabilities.⁵⁶ Concern had increased after 1975, when Pertamina, the state oil company of Indonesia, an OPEC member, had difficulty servicing its foreign debt, and was hardly lessened as the dollar came under severe selling pressure in international money markets, allegedly in consequence of a large-scale sell-off of United States securities by certain other OPEC countries.⁵⁷

Thus, even before February 1979 United States monetary authorities had had to consider how well the United States commercial banking system could cope with sudden shocks in light of the relative instability of its sources of funds, the increasing length of maturity of its loans and doubts about the creditworthiness of some of its largest borrowers. In a reassuring letter to Congressman Henry S. Reuss, Chairman of the House Committee on Banking, Finance and Urban Affairs, dated January 10, 1978, Treasury Secretary Blumenthal, like Assistant Secretary Bergsten earlier, expressed confidence in the ability of the banking system to deal with these problems on its own:

Maturity transformation is one of the principal functions of commercial banks, whether operating domestically or abroad. The transformation by individual banks of relatively shorter-term bank liabilities into longer-term assets becomes a source of concern only where there are gross excesses and inadequate attention is paid to risk. . .

We do not believe that maturity transformation represents a problem in the aggregate since liabilities in the global banking system cannot simply or suddenly be extinguished by the holders of the claims. As a practical matter, deposits withdrawn from a bank or banks must either be redeposited directly in another bank(s) or used to purchase goods, services or investments, with the proceeds of these sales being placed in the banking system in the absence of monetary policies designed to sterilize such funds.⁵⁸

The confidence publicly expressed by United States monetary authorities in the capacity of the banking system to recycle funds precipitously withdrawn from particular banks did not diminish even after the political and economic situation in Iran worsened the following year, and even though Iranian governmental agencies were known to be major sources of deposits in domestic and foreign branches of United States banks, as well as major

⁵⁴*Id.*

⁵⁵*Id.* at H1404.

⁵⁶See the letter dated December 15, 1977 from Chairman Reuss of the House Committee on Banking, Finance and Urban Affairs to which the Blumenthal letter, *supra* note 48, was in response. 124 CONG. REC. H1402-H1403 (Feb. 23, 1978).

⁵⁷Speculation on this point was reported, but not confirmed, in the HOUSE STAFF REPORT at 52.

⁵⁸Blumenthal letter, *supra* note 48, at H1407-H1408.

borrowers from those foreign branches. Shortly after the Shah was forced to leave Iran, both the Treasury Department and the New York Fed⁵⁹ commented favorably, if cautiously, upon a report issued by the General Accounting Office (GAO)⁶⁰ that found that even a massive sale of U.S. securities or withdrawal of deposits from American banks by OPEC members very likely would have a minimal impact on the American financial system. In an April 19, 1979 letter to the GAO, Mr. Bergsten had said that such action would "create problems, but not of a catastrophic nature,"⁶¹ adding, however, that:

We recognize, of course, that a sudden, massive attempt, whether by OPEC countries, by other foreigners, or by Americans, to convert into other currencies dollar assets held in the U.S. or abroad, could adversely affect the dollar exchange rate.⁶²

In his letter to the GAO, dated April 13th, the President of the New York Fed, Paul Volker, said:

We agree with the general thrust of the report that [OPEC financial] holdings do not themselves present a significant potential for affecting adversely the U.S. financial system or economy. Our financial institutions and markets have coped well with the massive international flow of funds that have developed in recent years in the wake of major increases in energy prices and other dislocations in the world economy. The Federal Reserve and Treasury working together have shown that they can deal effectively with major surges in financial flows, and we see no grounds for undue concern about our ability to handle future challenges of this sort.⁶³

Although the government was to take a very different position, at least publicly, seven months later in imposing the freeze, there is little reason to doubt that at this time, and possibly even at the time the Treasury recommended the imposition of a freeze to the President, United States monetary authorities were convinced that the dollar, the banking system and the United States economy could all withstand any "disruptions" revolutionary Iran on its own could cause. Whatever doubts they entertained probably did not lead to the conclusion that the United States government should adopt "monetary policies designed to sterilize" Iranian funds, at any rate, because these policies themselves could be expected to disrupt the dollar,

⁵⁹See note 25, *supra*.

⁶⁰The General Accounting Office was created by the Budget and Accounting Act, 31 U.S.C. § 41 (1921) to assist Congress, its committees and its members in carrying out their legislative and oversight responsibilities. It undertakes legal, accounting, auditing and claims settlement functions with respect to federal government programs and operations as assigned by Congress, and it makes recommendations designed to provide more efficient and effective governmental operations. It is under the direction and control of the Comptroller General of the United States. See generally UNITED STATES GOVERNMENT MANUAL 1980-1981 (Office of the Federal Register), at 55.

⁶¹Quoted in the HOUSE STAFF REPORT at 4.

⁶²*Id.*

⁶³*Id.*

the banking system and the United States economy far more seriously than would any repudiation of debts or withdrawal of funds by Iran.

The reason is that a significant portion of foreign investment in the United States is motivated, in large measure, by the expectation that such investments will be free from the degree of risk of expropriation or government-imposed blocking to which they are subject elsewhere in the world.⁶⁴ The possibility that the United States might block the transfer of assets of nationals of country X in consequence of political developments in country X undercuts this expectation. In 1979, then, United States monetary authorities understood clearly that a freeze of Iranian assets in this country could precipitate a reevaluation by all foreign investors of the attractiveness of investment in the United States. Moreover, because it was clear that the freeze, to be effective, would have to extend to Iranian deposits at foreign branches of United States banks, not just to Iranian accounts maintained and assets present in the United States, a freeze might strike at the foundations of the post-war banking and economic cooperation which had helped sustain Western economies for several decades and had made possible the relatively smooth recycling of petrodollars in the 1970s. The Eurodollar market itself was thought (by many American investors, not just foreign ones) to be immune from the vicissitudes of United States banking regulation. While this assumption was never justified (in that United States bank regulators asserted jurisdiction over the foreign branches of United States banks but refrained from exercising it in the interest of protecting the banks' competitive position in the Eurodollar market)⁶⁵ a dramatic illustration of just how unjustified it was could only have been expected to further discourage investment in the dollar and dollar-denominated securities issued by United States banks abroad.

In fact, the Iranian assets freeze and its application to Eurodollar deposits did reverberate throughout the world's principal investment centers, although the figures available so far are equivocal insofar as they neither support nor disprove the supposition that other OPEC nations would reverse their preference for the holding of dollar-denominated deposits with United States banks in the face of a freeze on such deposits adopted as a political maneuver in response to economic or political policies adopted abroad (i.e., in Iran). In May 1981, a Chase Manhattan Bank study indicated that OPEC deposits in American banks and their foreign branches actually rose by \$1.1 billion in 1980, pointing out, however, that this represented less than 3 percent of the total rise in OPEC deposits (\$44-\$45 billion) with banks in the industrialized countries, a far cry from 1979, when United States banks received over 40 percent of the increase in OPEC assets held with banks.⁶⁶

⁶⁴ See Papernick, *Risks of Private Foreign Investments in U.S.*, N.Y.L.J., Dec. 6, 1979, at p.1.

⁶⁵ See Harfield, *supra* note 46, *passim*.

⁶⁶ N.Y. Times, May 11, 1981, at D2. Of the \$110 billion OPEC current account surplus in 1980, \$44-45 billion went into bank deposits in industrialized countries; \$33 billion into other

What is clear, however, is that the imposition in peacetime of a freeze on foreign-owned assets on the scale involved in the case of Iran could not have been anticipated with undifferentiated glee by the banking community, which would have been—and ultimately was—the principal instrument of the freeze's enforcement. For while the Iranian assets control program does not appear to have precipitated a massive run on the dollar, this outcome could not have been safely predicted in 1979. A more reasonable prediction at that time would have been that such a freeze would have a severe impact on the capacity of American banks to compete for Eurodollar funds and, indeed, the attractiveness of dollar-denominated assets. Bearing in mind the banks' exposure from the sovereign lending they had undertaken in the 1970s, the added prospect of flight from Eurodollar deposits could only have seemed alarming to officers of individual banks.

To be sure, the political and economic deterioration in Iran posed severe problems for the banks, quite aside from those involved in dealing with new central bank and government authorities who, as noted, were unfamiliar with customary procedures, practices and law in the banking industry in general and the Eurodollar market in particular. The banks' stake in the Iranian situation was huge, by ordinary criteria. At the time of the freeze, American banks estimated that they were carrying \$2.6 billion in Iranian government loans on their books.⁶⁷ The rhetoric of the revolution in Iran made the stability of Iranian petrodollar deposits with foreign branches of United States banks uncertain. The Iranian situation, in short, had all the earmarks of the sort of credit crunch that could eventuate from the radical changes in commercial banking in the 1970s. The banks, in profitably recycling petrodollars, had been forced to bear sovereign lending risks the OPEC investors themselves had in large measure sought to avoid. Now, the consequences of these risks had begun to loom imminent.

investments in the same countries; \$5 billion was lent directly to oil-importing developing nations; \$5 billion went to international organizations; and some \$15 billion was accounted for by short-term credits for oil exports. *Id.* It is generally believed that some foreign investors concerned with the contingency for future interruptions with the enjoyment of foreign-owned assets by the American government switched to dollar-denominated securities of a kind that could be held outside the jurisdiction or interjurisdictional reach of American banking authorities and United States courts. The court-ordered attachments of securities and bank accounts during and after the Iranian assets freeze may have been as great a deterrence to holding assets with United States banks and other entities as was the freeze itself. *Cf.* N.Y. Times, Dec. 26, 1979, at D1; and *see pp.* 177-186, *infra*. *Cf.* Lissakers, *Money and Manipulation*, 44 FOREIGN POLICY, 107, 121 (1981).

⁶⁷ *See* Ball, *The Unseemly Squabble Over Iran's Assets*, FORTUNE, Jan. 28, 1980, at 60. Iran's military purchase contracts with the United States government totalled about \$12 billion. Commercial contracts of United States firms in Iran were reported by the Commerce Department to be worth \$15 to \$20 billion by the time the freeze was imposed, with \$2 to \$2.5 billion payable to such firms in any one year. *See* NAT'L L.J., March 5, 1979, at 3, 29.

The Role of the Banks

The banks that had participated in syndicated loans to Iran appear to have protected themselves more effectively than had other banks that lent money to (and most non-bank creditors of) Iran. However, the terms of the loan agreements varied, apparently even with respect to whether syndicate members were obliged to share funds they were in a position to "set off" once a default occurred.⁶⁸ When the November 1979 crisis threw the status of these loans into doubt, the exposure of syndicate members to loss from default varied widely, some having far more liabilities to (i.e., deposits of) Iran than the amount of their share of the loans to Iran, others quite the reverse, some, apparently, in a middle position.⁶⁹

It is worth emphasizing that even among syndicate members competition for Iranian dollar deposits had been fierce following the fall of the Shah. Their joint participation in syndication of loans to Iran did not diminish this rivalry. This general competition among United States commercial banks involved in the Eurodollar markets is important to bear in mind in light of charges made later that in proceeding to negotiate privately with the Iranian central bank authorities after the freeze had been imposed, the syndicate banks, with the help of the Treasury, proceeded to feather their own nests at some expense to non-syndicate members.⁷⁰

Moreover, it helps in understanding charges leveled almost immediately after the freeze was imposed that Treasury officials had been persuaded to recommend the freeze by certain of the largest banks, especially Chase Manhattan Bank.⁷¹ The evidence against Chase (*against* in the sense that the charges suggest that the freeze was in Chase's rather than in overall United States interests) was necessarily circumstantial. It is generally known that at least since the mid-1970s Chase had been a principal in many of the syndicated loans to Iran and that for so long as the Shah remained in power the revenues from the proceeds of the sale of Iranian oil in the United States were channeled principally through Chase.⁷² Few people doubted that the Shah himself had approved the choice of Chase for that

⁶⁸Provisions in some syndicate agreements, but apparently not in all of them, required a syndicate member receiving a windfall payment to share it with other members of the syndicate—a cooperative device that helped the members of the syndicate as a group but that left individual banks less protected than the amount of Iranian deposits it could get hold of might suggest. See HOUSE STAFF REPORT at 59-60.

⁶⁹Bank of America, for example, had over four times as much in Iranian dollar deposits in its overseas branches as did any other United States bank, and in relation to its huge amount of deposits it had a small amount of loan exposure. Chemical Bank, on the other hand, had seven times as much tied up in dollar loans to Iran as it held in Iranian overseas deposits. HOUSE STAFF REPORT at 38.

⁷⁰See House Staff Report at 60-61.

⁷¹See, for example, *Legal Repercussions of the Freezing of Iranian Assets and Loans*, INT'L CURRENCY REV. 25 (March 1, 1980); Taylor, *Megabankers, Carter Schemed to Create Iranian Crisis, Freeze Funds*, SPOTLIGHT, Feb. 9, 1981, at 16; Sherrill, *Big Oil, Big Banks, Big Trouble*, PENTHOUSE MAGAZINE, June 1980, at 72; Davis, *Hostages for the Chase Manhattan*, *id.*, December 1980, at 174; and, generally, HOUSE STAFF REPORT at 51-60.

⁷²See note 26, *supra*.

coveted account.⁷³ Whether David Rockefeller, Chairman of the Board of Chase, was as intimate a personal as well as professional associate of the Shah as has often been assumed in the press is open to honest doubt.⁷⁴ But that he and Chase were closely associated with the Shah in the minds of the Iranians who overthrew the Shah is not. Nor is there any reason to doubt that Mr. Rockefeller himself played a leading role in the campaign to persuade the Carter Administration to admit the Shah; Mr. Rockefeller has readily acknowledged this role.⁷⁵ Because of these links, and because in revolutionary Iran it was taken for granted that Chase was the conduit used by the Shah to secrete his personal wealth outside Iran, Mr. Rockefeller and Chase became favorite targets of vituperative revolutionary rhetoric. More than that, the shift of Iranian accounts from Chase became a revolutionary tenet.⁷⁶

By tying several of these threads together, critics made out more than a coincidence in the timing of several events that immediately preceded the imposition of the freeze. They noted, for example, that it was during those months that Iran began shifting funds out of Chase⁷⁷ and, coincidentally or otherwise, that David Rockefeller, former Secretary of State Henry Kissinger, and New York attorney John J. McCloy, among others, had intensified their efforts to persuade President Carter to admit the Shah to the United States.⁷⁸ The theory has been advanced in several quarters that Chase engineered the freeze by convincing the government to permit the Shah to come to the United States, knowing that that act would lead to violence in Iran and make inevitable a freeze that would halt the outflow of funds from Chase, at least temporarily.⁷⁹ This, it has been suggested, would have given Chase time to protect itself against threats to its liquidity allegedly posed by a withdrawal of Iranian funds and the possibility that

⁷³See HOUSE STAFF REPORT at 8.

⁷⁴*Id.* His late brother Nelson, former vice president and, before that, governor of New York, had been a personal friend of the Shah for two decades. See Smith, *Why Carter Admitted the Shah*, in *America in Captivity: Points of Decision in the Hostage Crisis, An Inquiry by the New York Times*, New York Times Magazine (Special Issue, 1981), at 40. The International Basic Economy Corporation, a company created by the Rockefeller family, reportedly built the first housing development in Iran in the mid-1950s at the foot of the property on which the Shah's palace was eventually built. See N.Y. Times, Nov. 15, 1979, at A19.

⁷⁵*Id.* at 37.

⁷⁶HOUSE STAFF REPORT at 8. See also note 26, *supra*.

⁷⁷HOUSE STAFF REPORT at 55.

⁷⁸Dr. Kissinger has been a long-time adviser to the Rockefellers and, subsequent to serving as Secretary of State, was an adviser to Chase in its international operations. Mr. McCloy, who was in his mid-eighties by the time of the Iranian crisis, has served the United States government in a variety of high level foreign policy positions since the 1940s. He had known the Shah for years and his New York law firm, Milbank, Tweed, Hadley and McCloy, had represented the Shah's family in many legal matters. The firm also represents Chase. See Smith, *Why Carter Admitted the Shah*, *supra* note 74, at 44.

⁷⁹HOUSE STAFF REPORT at 56. Whatever Chase's and Mr. Rockefeller's roles may have been in bringing the Shah to the United States and persuading United States monetary authorities to impose a freeze on Iranian assets, they are unlikely to have been motivated by as simplistic an anticipation of cause and effect in United States and Iranian politics as these. *Id.*

Iran might repudiate all or some of the outstanding loans.⁸⁰

Another version of this charge suggests that the Shah himself had threatened to withdraw his, his family's and his family foundation's deposits from Chase, if he were denied admission to the United States.⁸¹ According to one published account,⁸² the Treasury was even concerned that the Shah might have accumulated an enormous secret stock of United States government securities that he was prepared to sell, a prospect the Treasury allegedly feared because it was believed that a massive sale of United States securities by one or more OPEC countries during 1977 and 1978 had produced a serious run on the dollar. The Shah's cache, the theory runs, might have been larger; the Treasury just did not know.⁸³

The case against Chase or the Shah or both bringing about the events which led to the imposition of a freeze seemed to be strengthened, again circumstantially, by the way Chase handled Bank Markazi's request to draw down just over \$4 million from Iran's account with Chase's London

⁸⁰See Davis, *Hostages for the Chase Manhattan*, *supra* note 71, at 174, as quoted in the HOUSE STAFF REPORT at 54-55. A similar suggestion, more cautiously worded, appeared in a column by syndicated columnist Jack Anderson, *Washington Post*, March 24, 1980, at C23. Excerpts from these reports are quoted in the *House Staff Report* at 54-55 and 53-54, respectively. The *House Staff Report* gave little credence to suggestions that Chase's liquidity was endangered by Iran's withdrawal of deposits. It said:

While Iran at various times held fairly major deposits with Chase, the bank was hardly dependent on the deposits for its solvency. The daily cash flow of Chase's worldwide operations dwarfed the Iranian deposits. While a total withdrawal of those deposits would have hurt Chase, realistically it would not have been anywhere near a mortal blow driving Chase into bankruptcy, as the quotes from the Jack Anderson column and from *Penthouse* suggest. Indeed, one Chase official has described the effect on Chase of an Iranian withdrawal as a "hiccup."

Id. at 55.

⁸¹See Sherrill, *Big Oil, Big Banks, Big Trouble*, *PENTHOUSE MAGAZINE*, June 1980, at 72; and Wright, *Buried Treasure at Chase Manhattan*, *INQUIRY*, April 7, 1980, at 15. Excerpts from these reports are quoted in the *House Staff Report* at 54 and 52-53, respectively.

⁸²Wright, *Buried Treasure* . . . , *supra* note 81.

⁸³The *House Staff Report* accorded little credence to this speculation, as well. It said:

Based on discussions with many of the principals involved in admitting the Shah, there is no indication that the Shah's alleged holdings of Treasury securities played in the negotiations [leading to the admission of the Shah to the United States].

The allegation itself assumes that Treasury was ignorant of the Shah's actual holdings of Treasury securities. If the Shah did not hold those securities in his own name or if a broker of some sort was used to purchase them, in fact Treasury would not know exactly how much the Shah may have held. Officials at the Treasury who are most familiar with the transactions in Treasury securities say they were never asked for information about the Shah's personal or family holdings of those securities by any officials involved in negotiations with the Shah. Even assuming the Shah threatened to withdraw his purported holdings of Treasury securities if he were not admitted to the United States, it is inconceivable that senior United States officials hearing such a threat would not have checked with their United States Government sources to get information about the Shah's holdings. No one involved in discussions concerning the Shah recalls withdrawal of the Shah's assets being part of the matters discussed. Therefore the issue of how much information the United States would have on the Shah's wealth and the impact of a withdrawal of his assets never played a role in the Shah's admission.

HOUSE STAFF REPORT at 53.

branch and to use the funds to pay the next installment on a \$500 million "jumbo" loan for which Chase was the agent for a syndicate made up of seven American and four non-American banks. The cabled instructions were sent and received on November 5, ten days before the installment due date (and, as it happens, one day after the seizure of the embassy). On November 14, Iran's Foreign Minister, Abdolhassan Bani-Sadr, himself involved in a struggle for power in Iran with religious leaders, suggested at a news conference that Iran might—or was going to that day (this discrepancy in reports of the event has never been resolved)⁸⁴—withdraw its funds from United States banks and their overseas branches and transfer them to friendlier countries.⁸⁵ News of the announcement reached Washington before dawn on November 14 and prompted Treasury Secretary G. William Miller to awaken the President and recommend that he sign an executive order freezing Iran's assets.⁸⁶ The freeze barred transfers of property and interests in property of the Iranian government, its instrumentalities and controlled entities, and Bank Markazi "which are in or come within the possession or control of persons subject to the jurisdiction of the United States." Chase cabled Bank Markazi that by virtue of the freeze order its (Bank Markazi's) payment instructions could not be carried out. Chase also demanded immediate payment of the installment and when Iran did not pay (from funds not subject to the transfer freeze), the Chase-led syndicate voted to declare the loan in default.

Some nonbanking, and nonlawyering critics charged that Chase could have complied with Bank Markazi's request before the 15th;⁸⁷ in fact, it appears that the terms of Iran's payment order prohibited payment before that date.⁸⁸ Some published accounts said Chase simply informed the other syndicate members that Iran was in default;⁸⁹ in fact, Chase appears to have complied with syndicate agreement provisions requiring a polling of loan syndicate members to determine their preference as to a declaration of the existence of a default.⁹⁰ Reports appeared that the vote was seven to four in favor of declaring a state of default, with the four non-American

⁸⁴ Compare Davis, *supra* note 71, with Smith, *Hostages First*, *supra* note 5, at 82.

⁸⁵ See N.Y. Times, Nov. 15, 1979, at 1; Ball, *The Unseemly Squabble Over Iran's Assets*, *supra* note 67, at 61; and the sources cited in note 84, *supra*.

⁸⁶ See N.Y. Times, Nov. 15, 1979, at 1; *Escalating the Iranian Drama*, BUSINESS WEEK, Nov. 26, 1979, at 31; and Smith, *Hostages' First*, *supra* note 5, at 82. According to press accounts, a Treasury Department watch officer read the reports of Mr. Bani-Sadr's threat between 4:00 A.M. and 5:00 A.M. and informed Secretary Miller. After determining that no withdrawals had been made and after asking for support from central banks in Europe and Japan, Secretary Miller awakened the President, recommending that he sign the order which, as already noted, had been prepared well in advance. The President is reported to have signed the order at 8:00 A.M. Washington time. See statement of Robert Carswell before the Senate Committee on Banking, Housing and Urban Affairs, Feb. 19, 1981, at 3.

⁸⁷ E.g., Davis, *supra* note 71, as quoted in HOUSE STAFF REPORT at 54-55.

⁸⁸ HOUSE STAFF REPORT at 55.

⁸⁹ E.g., Davis, *supra* note 71, as quoted in HOUSE STAFF REPORT at 54.

⁹⁰ See Ball, *supra* note 67, at 61.

banks voting against;⁹¹ later reports indicated the four negative votes would have been affirmative had the foreign banks been aware of the legal basis for the United States government's assertion that the freeze legally barred transfer of Iranian deposits in accounts in foreign branches of United States banks.⁹²

The loan syndicate's determination that Iran's failure to pay the installment due November 15 constituted an act of default triggered acceleration clauses in the loan agreement that made the entire amount of the loan due and payable,⁹³ and led the banks to debit Iran's frozen accounts at their overseas branches for the full amount owing to them—at least to the extent permitted under the agreement and to the extent individual loan syndicate members had such liabilities (deposits) on hand to offset. These actions, in turn, implicated creditor protection clauses in other loan agreements. Almost immediately, a rush was on among Iran's creditors, including its nonbank creditors, to attach whatever Iranian government assets were or might become available for attachment in the United States and Europe.⁹⁴

Chase's prominence in this episode added to speculation that it, and in particular Mr. Rockefeller, triggered the Iranian hostage crisis to protect the bank's own financial interests. Mr. Bani-Sadr contributed more fuel to the fire at his press conference on November 14 when he said that the withdrawal of Iranian funds from United States banks he was then threatening was justified on the grounds that the banking interests led by Chase and Mr. Rockefeller were responsible for the admission of the Shah to the United States.⁹⁵ The inference was drawn that the admission of the Shah to the United States and the imposition of a freeze on Iranian assets were all part of an elaborate financial plot designed to help the banks, especially Chase, out of the difficulties they created for themselves in overextending credit to Third World countries.

In July 1981, however, the bipartisan report by the staff of the House of Representatives' Committee on Banking, Finance and Urban Affairs (published as a Committee Print even without official adoption by the Committee) concluded that scenarios of the kind herein and therein described "are filled with conclusions that are more fanciful than real."⁹⁶ It offered several reasons to doubt the Chase-did-it theories. First, Chase could not safely have predicted that admission of the Shah to the United States would lead to a taking of hostages in Iran, a United States government freeze on Iranian assets and ultimate benefits for Chase's financial interests. Further association with the Shah might well have presented itself as an undesirable policy, if the bank's future relations with Iran and other third world nations

⁹¹*Id.*

⁹²See *Why Did Chase Move So Fast?*, EUROMONEY, January 1980 (cover story).

⁹³See *Legal Repercussions* . . . , *supra* note 71, at 28.

⁹⁴See Gordon, *supra* note 20, *Passion*.

⁹⁵N.Y. Times, Nov. 15, 1979, at A19.

⁹⁶HOUSE STAFF REPORT at 56.

were considered objectively. Moreover, as some Chase critics themselves have pointed out, if Chase needed an event like the freeze to persuade fellow loan syndicate members to declare the \$500 million loan (or all Iran's syndicated loans with cross-default clauses) in default,⁹⁷ there were surely measures available to it involving less risk of a severe and wholly unpredictable reaction from other OPEC investors than a freeze entailed.

Speculation that the banks, especially Chase Manhattan, had persuaded the government that a freeze was in the best interests of the United States was hardly dampened by the reasons advanced publicly—and apparently privately—by the government for imposing the freeze as it did and when it did. In his message to Congress explaining the circumstances dictating his need to invoke the extraordinary powers authorized by IEEPA, President Carter cited “recent events in Iran and the recent actions of the government of Iran,” adding that “these events and actions put at a grave risk the personal safety of United States citizens and the lawful claims of United States citizens and entities against the government of Iran.”⁹⁸ Imposition of the freeze, he said, was necessary to “enable the United States to assure that these [blocked] resources will be available to satisfy lawful claims of citizens and entities of the United States against the government of Iran.”⁹⁹ Secretary Miller reportedly telephoned the Saudi finance minister immediately to assure him the freeze was an act of financial self-defense, designed to protect the dollar, and not a matter of political retaliation.¹⁰⁰ The details of his awakening President Carter upon receiving news of Mr. Bani-Sadr's threat were featured conspicuously in press accounts of how the freeze came to be invoked,¹⁰¹ thereby adding to the impression that the threat represented a dramatic and dangerous new element in the Iranian situation. The same theme was sounded by Secretary Miller in his subsequent mission to Mideast and European capitals to explain the freeze to foreign officials who were alarmed by the implications of the freeze for their own dollar investments and the well-being of the petrodollar recycling system.¹⁰²

The July 1981 House Banking Committee staff report called attention to the pronounced discrepancy between these administration assertions and previous assurances from government monetary authorities that the banking system was capable of handling even sudden and massive withdrawals by foreign depositors of the type Mr. Bani-Sadr was threatening to carry out. “While there is no doubt that Bani-Sadr made such a statement,” the

⁹⁷The *House Staff Report* indicated, without being too specific about dates, that some time during the first half of 1979, the United States banks polled by Chase refused to consider calling any of the Iranian loans. *Id.* at 3.

⁹⁸15 WEEKLY COMP. PRES. DOC. 2118 (Nov. 14, 1979).

⁹⁹*Id.*

¹⁰⁰Smith, *Hostages First*, *supra* note 5, at 82.

¹⁰¹See, for example, N.Y. Times, Nov. 15, 1979, at 1; *Escalating the Iranian Drama*, BUSINESS WEEK, Nov. 26, 1979, at 31; and Ball, *Unseemly Squabble Over Iran's Assets*, *supra* note 67, at 61.

¹⁰²See N.Y. Times, Dec. 3, 1979, at D1; *Legal Repercussions . . .*, *supra* note 71, at 25; and HOUSE STAFF REPORT at 13-14.

report concluded, "there is very serious doubt that if the Bani-Sadr statement were carried out to the fullest degree . . . the economy of the United States would have been subject to an unusual and extraordinary threat."¹⁰³ It then observed:

Longstanding and apparently universally accepted Department of the Treasury policy . . . directly contradicted the premise that withdrawal of Iranian deposits from U.S. financial institutions would jeopardize our United States financial system or pose an unusual or extraordinary threat to the economy of the United States. Similarly, Iranian threats to repudiate its United States obligations, which had been threatened by revolutionary figures on various occasions without result for as long as a year before the hostage crisis, was an unlikely event, and if consummated, not an unusual and extraordinary threat to the economy of the United States . . . Discussions with the vast majority of the individuals involved in preparing the recommendations to President Carter to trigger IEEPA indicate that while outflows of Iranian dollars and Iranian debt repudiation were considered, the freeze was basically a political response to the barbaric acts of the Iranians.¹⁰⁴

The staff report noted that statements by the government, particularly those by Secretary Miller, "attempt to lead one to conclude that a primary justification for the freeze was the threat to the United States economy [posed] by Iranian repudiation of United States debt and the withdrawal of Iranian funds from United States financial institutions."¹⁰⁵ It then asked and answered the critical question:

If, in fact, the freeze was truly a political response to the severity of the Iranian actions, which constituted an unusual or extraordinary threat to the national security and foreign policy of the United States,¹⁰⁶ then, why was there so much public emphasis put on the economic ramifications of Iran's actions? It is our opinion that the Carter Administration was in the process of implementing the freeze before Bani-Sadr made his threat to withdraw Iranian funds from United States banks. The Bani-Sadr threat added an economic justification—however weak its premise—to the actual political justification which prompted the freeze. The added economic justification became important because of the reaction to the freeze by others, primarily OPEC countries.¹⁰⁷

The report recalled that, at the time, such countries (Saudi Arabia in particular) were under internal religious pressures that made their endorsement of a United States freeze based on political grounds practically impossible.

¹⁰³HOUSE STAFF REPORT at 13.

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶The report's repeated references to "an unusual or extraordinary threat" is understood to relate back to the conditions which trigger the applicability of IEEPA.

¹⁰⁷HOUSE STAFF REPORT at 13. A recently published article by a former State Department analyst offers virtually the opposite conclusion. Writing in *Foreign Policy*, Karin Lissakers says that the freeze was, in fact, imposed because the government feared that Iran would use its dollar deposits in American banks as an economic weapon. Quoting then Under-Secretary of the Treasury Anthony Solomon as saying, "Our concern that morning [*i.e.*, November 14] was the dollar, not the banks," Ms. Lissakers adds: "Iran, they thought, would seek to disrupt foreign exchange markets, even at the risk of reducing the value of its foreign [dollar] holdings." Lissakers, *supra* note 66, at 112. It seems impossible to reconcile the conclusions reached by the House staff with Ms. Lissakers' assertions.

Emphasis on the alleged economic reasons for the freeze enabled them to support (or at least tolerate) the freeze by stressing it as an effort to preserve the dollar and the United States economy, an economy in which such OPEC countries as Saudi Arabia and Kuwait had made major investments.¹⁰⁸

That the freeze was primarily a political response may explain its timing, but it does not explain exactly what benefits the government hoped to obtain from it. Soundings taken by the New York Fed the weekend before the Wednesday (November 14) on which the freeze was announced indicated that the major New York banks were generally against the imposition of a freeze,¹⁰⁹ and that those that were for it were those whose Iranian deposits were small compared to their exposure to Iranian loans nonpayment.¹¹⁰ The House Staff Report summarized these attitudes this way:

The reason for these differing positions was that Iran's fleeing deposits would generally return to the United States banking system after being funneled through a foreign bank or the Eurodollar market or both. This "recycling" concept, which was widely accepted by those familiar with the Eurodollar market, meant that a bank could generally get back what it lost in withdrawn deposits if it were willing to pay a premium on the Eurodollar market. On the other hand, a repudiated loan, and particularly one without any possibility of setoff against an Iranian deposit, could not be recouped in a similar fashion. Accordingly, those institutions with large loan portfolios and few deposits were more interested in the potential value of a freeze, and in preserving the status quo, than those relatively secure institutions with deposits far in excess of their Iranian loans.¹¹¹

The Federal Reserve was apparently against the freeze, in part because any action which created the appearance of nervousness or instability in the American financial marketplace made it difficult for the Federal Reserve to deal confidently with its foreign central bank counterparts, but also because it anticipated that foreign banks might attempt to use the appearance of instability in the United States financial system for their own competitive advantage.¹¹²

¹⁰⁸HOUSE STAFF REPORT at 14.

¹⁰⁹The Federal Reserve collects and reports to the Treasury critical information on foreign deposits in United States banks and loan exposure of United States banks to foreign countries. The information is collected monthly—detailed information quarterly—and can easily become outdated. After the seizure of the embassy on November 4, United States government policy-makers wanted more accurate information on the aggregate Iranian deposit and loan exposure for United States banks in order to judge the impact of potential sanctions against Iran. On November 10, a Saturday, in response to a request for emergency assistance from Treasury Secretary Miller, Federal Reserve Board Chairman Paul Volker directed New York Fed Vice President Scott Pardee to gather up-to-date information from United States bankers on Iranian deposits and loans. Mr. Pardee telephoned each of the major New York banks that held accounts with Iran to determine the latest status of these loans and deposits. By Monday, November 12, which was a legal holiday, he had gathered enough information to give Treasury officials some statistics. "While [his] contacts with the banks were meant to be informational and statistical, [Mr. Pardee] was also instructed to take note of any comments that bankers might make about the possibility of an assets freeze." HOUSE STAFF REPORT at 43.

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹²*Id.*

Thus, the administration was aware that from the point of view of the banking community a freeze of the approximately \$6.8 billion of Iranian assets on deposit at United States and foreign branches of United States banks¹¹³ was as likely as not to be counterproductive. What advice the government was getting from United States claimants outside the banking system has not yet been made public. Presumably, legal counsel for these claimants were aware that, while a freeze would enable some of Iran's bank creditors in the United States to offset Iranian deposits, their own clients would probably have no such mechanism available to them, at least as to the assets of Iranian government entities, *i.e.*, as the Treasury Department had foreseen nine months earlier.¹¹⁴ The freeze order would effectively keep Iranian government assets from being removed from the United States for a while, but that in itself would enhance the likelihood of the nonbanking claimants being paid only, or most likely, if the government could use its powers under IEEPA to authorize United States courts to order attachments of Iranian government property—and even that would help only to the extent such property was available after the banks had set off Iranian government deposits in amounts at least equal to the aggregate amount of the banks' own claims.

Of course, it is entirely possible that most nonbanking claimants had not yet given serious thought to how a freeze would affect their interests, short-term or long-term, and that, had they tried to do so, they would not have had available to them sufficient data about the amount of Iranian deposits in the United States that might be subject to the freeze, the legal position of the banks respecting offsets of Iranian deposits and the priority to be given to such offsets as against rights of other claimants, and even whether the government freeze order would effectively prohibit any attachments of Iranian government property during the period it was in effect. Thus, while they might well have realized that without a freeze they would probably have to chase Iranian assets the world over to satisfy their claims, they could not have been certain that even with a freeze in place their task would be any easier.

But in the political climate that prevailed in Washington during the ten days following the seizure of the embassy and the taking of the hostages, these considerations may have received comparatively short shrift. What was at stake was America's reputation—and President Carter's. A consensus was reached quickly to proceed with a freeze, not so much because it would immediately cause Iran to release the hostages as because the government had to do something to show the Iranians, the American public and the world at large that it could, and would, take decisive action. The

¹¹³*Id.* at 29.

¹¹⁴*See* page 165, *supra*.

idea of a freeze probably struck no one in the government as a particularly appealing idea. But it may well have seemed to be the best option available at the time among those that presented a reasonable likelihood of furthering diplomatic efforts to obtain the hostages' release.